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No. 95-1310

Supreme Court, U.S.
FILED
APR 22 1996

In The

Supreme Court of the United States

October Term, 1995

ISRAEL TRAVEL ADVISORY SERVICE, INC.,

Petitioner,

vs.

ISRAEL IDENTITY TOURS, INC., LARRY RITTER and MARLENE RITTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a competitor asserting a claim pursuant to the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), based upon a predicate act of mail fraud committed by means of allegedly false advertising directed at potential customers, has standing under the RICO statute.

STATEMENT UNDER RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Israel Identity Tours, Inc. states that it has no parent or subsidiary companies.

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Respondents, Israel Identity Tours, Inc., a New Jersey corporation ("IIT-NJ"), Larry Ritter and Marlene Ritter, respectfully submit this brief in opposition to the petition for writ of certiorari filed by Israel Travel Advisory Service, Inc. ("ITAS") which seeks the review of a decision of the United States Court of Appeals for the Seventh Circuit. That decision is reported at 61 F.3d 1250 (7th Cir. 1995) and is attached to ITAS' petition as Appendix A.

STATEMENT OF THE CASE

This case involves the unfounded claims of ITAS that Larry Ritter, Marlene Ritter and IIT-NJ engaged in unfair trade practices. Specifically, ITAS claims that IIT-NJ employed false advertisements which fraudulently induced prospective customers to travel with IIT-NJ instead of ITAS. Those claims of false advertising have been rejected throughout this case. The jury decided that there was no false advertising in its verdict under the Lanham Act claim which was affirmed by the Seventh Circuit. Nevertheless, ITAS continues to pursue its alleged RICO claims even though it has never been able to establish any fraud by the respondents or any damages as a result of the alleged fraud.

A. Procedural History.

On April 7, 1992, ITAS filed a thirteen count Verified Complaint for Injunctive and Other Relief against respondents, Ilene Wallerstein, Israel Identity Tours, an Illinois corporation, Gilbert Wallerstein and Karen Kaplan.[1] With respect to respondent Marlene Ritter, summary judgment was entered in her favor and against ITAS on each and every count of the

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1. Ilene Wallerstein, Gilbert Wallerstein, Israel Identity Tours, an Illinois corporation and Karen Kaplan were dismissed pursuant to a settlement agreement on January 4, 1993. (DE 79).

Verified Complaint on May 6, 1993 on the basis that ITAS could present no evidence that she played any role in the operation of IIT-NJ. (DE 176). (A copy of the district court opinion entering summary judgment is attached to ITAS' petition as Appendix B, pp. 29-30.) Summary judgment was also entered in favor of Larry Ritter and IIT-NJ on ITAS' claims pursuant to the Racketeering Influenced and Corrupt Organizations Act, the New Jersey Consumer Fraud Act and the common law claims of intentional interference with contract and tortious interference with business relations. (DE 176; ITAS App. B). Judgment as a matter of law was entered in favor of Larry Ritter and IIT-NJ after the close of plaintiff's case on the claims for violation of Section 1 of the Sherman Antitrust Act and the Illinois Unfair Trade Practices Act. (DE 203 & 204, 223 & 224).

The only claims submitted to the jury were pursuant to the Lanham Act and common law defamation. On December 3, 1993, the jury rendered its verdict in favor of both Larry Ritter and IIT-NJ on the Lanham Act claim and in favor of Larry Ritter on the defamation claim. The only claim upon which ITAS was successful was its defamation claim against IIT-NJ. The jury rendered a verdict against IIT-NJ on the defamation claim and awarded ITAS $177,945.00 in compensatory and punitive damages. (DE 298). Judgment was entered on the district court docket on December 7, 1993. (DE 300).

In its petition, ITAS only seeks review concerning its RICO claims. The district court granted summary judgment to respondents based on this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). The district court stated that "*Holmes* is fatal to ITAS' RICO claims because ITAS cannot establish proximate cause. ITAS does not claim it was directly injured by IIT's conduct. Instead, ITAS claims the injury resulted from defrauded customers choosing IIT instead of ITAS — a purely economic injury resulting from

IIT's alleged fraud on third parties. To permit recovery on this theory would 'go beyond that first step.' Because only the intervening customers' choices connect IIT's alleged violation to ITAS' injury (*cf. Holmes*, 112 S. Ct. at 1319), ITAS fails to create a genuine issue of material fact as to whether its injury was proximately caused by IIT's alleged violation." (ITAS App. 25).

The Seventh Circuit affirmed the summary judgment entered by the district court. The basis of the Seventh Circuit's opinion, however, was not that ITAS lacked proximate cause, but that ITAS lacked standing to proceed against respondents. The Seventh Circuit reasoned that, with a predicate act of mail fraud, ITAS was not the object of the alleged fraud. Specifically, the appellate court indicated that the "essential point is that the victims of the fraud are the object of solicitude; § 1341 does not establish a regimen of truth-telling without regard to details like who is losing out and why." *Israel Travel*, 61 F.3d at 1258. (ITAS App. 13). The Seventh Circuit pointed out that, under tort law, "a plaintiff claiming injury by the defendant's violation of a statute must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law." *Id.* at 125. (ITAS App. 14). Applying this rule of law, the Seventh Circuit correctly concluded that ITAS did not have standing to pursue a RICO claim against respondents because "Section 1341 does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Id.*

Whether the basis is that ITAS lacks standing to proceed against respondents or that proximate cause does not exist, both the district court and the appellate court reached the correct result. The fraud alleged by ITAS was not directed to it. ITAS does not contend that it was defrauded by respondents' allegedly false advertising. If anybody was defrauded, it was the potential

customers. Only those customers would be allowed to proceed against respondents based on ITAS' claims. ITAS is left to the protection of other federal, state and common law claims.

B. Factual Background.

1. The Parties.

Larry Ritter, along with Jay Cantor and Sanford Goldberg, started a new company, IIT-NJ, in November, 1990, which competed with ITAS in the business of sending people on tours to Israel. (Tr. 318) Larry Ritter first considered going into the business of planning and organizing religious-oriented tours to Israel when he was approached by Israeli tour guide Ben Ami Geller in approximately October 1990. (Tr. 93). Geller had recently been terminated by ITAS, was seeking alternative means of generating income and had known Larry socially for several years. (Tr. 93-94, 1306-1307). Geller requested that Larry organize tours to Israel out of the New York/New Jersey area with Geller as the tour director and primary guide. (Tr. 1306-1307). Geller also had approached Ilene Wallerstein and Karen Kaplan with the idea that they organize tours to Israel from the Chicago and Boston areas, respectively. (Tr. 387, 390, 1131-1137).

Larry Ritter did not agree to Geller's proposal. At a meeting held on November 7, 1990, with Ilene Wallerstein, Ben Ami Geller and Karen Kaplan, Larry instead agreed to establish an independent New Jersey corporation named Israel Identity Tours, Inc. (Tr. 113-115, 396-397, 1300, 1306-1307). That company, IIT-NJ, was a legally and economically separate entity from the companies being established by Wallerstein and Kaplan. (Tr. 315-318, 397).

IIT-NJ began actual operations in 1991. (Tr. 126, 333, 337).

At that time, it attempted to sell tours to persons in the New York/ New Jersey area. (Tr. 126-127). ITAS and its owners, Marilyn Ziemke and Celia Shar, admit that they immediately fought against any attempt by IIT-NJ and Larry Ritter to succeed. (Tr. 968, 1188; Def. Exh. 29, 31). They denigrated IIT-NJ and Larry Ritter to prospective customers. (Tr. 980, 1188; Def. Exh. 29, 31). They told people that Larry Ritter was a liar who was part of the Mafia and who used gangster tactics. (Tr. 980-990, 1188; Def. Exh. 29, 31). This lawsuit has been part of the continuing attempts by ITAS to prevent Larry Ritter from succeeding in the business of sending tourists to Israel.

It must also be noted that ITAS is far more successful than IIT-NJ. ITAS sent over 2,000 people to Israel in both 1992 and 1993 while IIT-NJ sent a fraction of that amount. (Tr. 211, 803). Similarly, ITAS' gross revenues exceeded $5,500,000 in 1992 and was projected to exceed that amount in 1993. (Tr. 1024; Pl. Exh. 247, Def. Exh. 85). IIT-NJ's gross revenues in 1991 were only $385,285. (Pl. Exh. 389). Clearly, this case involves an existing comany with substantial business attempting to prevent a new business from successfully competing in the market.

2. *The Allegedly Fraudulent Conduct.*

ITAS claims that IIT-NJ engaged in mail fraud by means of alleged false advertising. In its petition, ITAS claims three instances of false advertising by IIT-NJ. The first involves IIT-NJ's advertisement of a free tour of Israel for a bar/bat mitzvah child. (Pl. Exh. 249 and 120). ITAS's claim that this advertisement was fraudulent is erroneous. Each and every such advertisement either had an asterisk indicating that restrictions applied or told the potential customer to contact IIT-NJ for further information. (Tr. 200-202, 349-350; Pl. Exh. 172, 222, 249 and 120). Furthermore, IIT-NJ did provide a free tour of Israel for the Bar/Bat Mitzvah child. (Tr. 198, 348-350). All the

customer paid for was the airfare, a fact which was explained to the potential customer by IIT-NJ. (Tr. 202-203, 349-350).

The second item discussed by ITAS is the inclusion of Joel Leibowitz's name in certain IIT-NJ advertisements. Contrary to ITAS' statements, none of the advertisements indicated that Leibowitz was a "partner" in IIT-NJ. Furthermore, although he never became a shareholder in IIT-NJ, Leibowitz did act as its agent and was involved in some of its business. (Tr. 206-206, 355). The advertisements which ITAS complains of never specified Leibowitz's position with IIT-NJ. (Tr. 355-356). The mere listing of Leibowitz's name, or the use of his name with his permission, cannot be said to be false advertising.

Similarly, the inclusion of a letter written by Rabbi Fellner was neither deceptive nor fraudulent. Rabbi Fellner's letter does not say that he had been on a tour with IIT-NJ, but that he had been on the tour. The fact is that he had been on the same tour to Israel even though it was not through IIT-NJ.

What ITAS does not tell this Court is that its claim that IIT-NJ committed fraud has been rejected by the jury. The exact facts argued by ITAS to constitute fraud were the subject of its claim under the Lanham Act. The jury had the opportunity to review all the evidence, including the advertisements which ITAS claims constitute false advertising. The verdict of the jury clearly reveals that it did not believe that IIT-NJ had engaged in false advertising or fraudulent conduct.[2]

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2. In its petition, ITAS implies that Larry Ritter would have Ilene Wallerstein call potential customers with the knowledge that those customers would defame ITAS. This allegation is both irrelevant to the issue presented to this Court and untrue. The jury entered a verdict in favor of Larry Ritter on the defamation count. Clearly, the jury believed Larry Ritter was not personally involved in any defamation of ITAS.

SUMMARY OF REASONS FOR DENYING WRIT

There are no compelling reasons for granting a writ of certiorari in this case. First, contrary to the contentions of ITAS, the Seventh Circuit's decision below does not create a conflict in the courts of appeals. The issue found by the Seventh Circuit to be dispositive in this case — whether a RICO plaintiff basing its claim on the predicate act of mail fraud must meet the standing requirements of the mail fraud statute — has been addressed twice in the courts of appeals, by the Ninth Circuit in *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991) and the Seventh Circuit here. There is no conflict in these two decisions. The Seventh Circuit expressly followed *Lancaster* to avoid any conflict. *Israel Travel*, 61 F.3d at 1258. (ITAS App. 9). The Fourth Circuit did not address this issue, or any standing issue at all, in *Mid Atlantic Telecom v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994). Because there is no conflict in the courts of appeals on the "same" issue, ITAS' Petition falls well outside the criteria described in Rule 10 for this Court's exercise of its jurisdiction. Supreme Court Rule 10(a).

Second, the issue raised by the facts in this case is not of sufficient importance to justify this Court's attention. Any disposition of the narrow issue presented by the facts of this case will affect very few litigants: only plaintiffs such as ITAS who seek to impose RICO liability on a competitor where the predicate act of mail fraud is based on misleading statements made to mutual customers. As a practical matter, a decision of this Court on the issue raised by the Seventh Circuit's decision below would be of small effect.

Furthermore, an impressive arsenal of alternative remedies is already available to such a plaintiff. Here, ITAS unsuccessfully brought claims against the respondents under the

Lanham Act ,15 U.S.C. § 1501 *et seq.* and state consumer fraud statutes, which all make provision for exemplary damages and attorneys fees to the successful plaintiff. In a case such as this one, where the claim involves allegations of unfair competition, the RICO Act is not the appropriate means for seeking redress.

In addition, a decision on the mail fraud standing question would not necessarily apply to other RICO predicate acts. Justice Scalia concluded in his *Holmes* concurrence that separate analysis would be required for each predicate act. *Holmes*, 503 U.S. at 288. Justice O'Connor also conceded the possibility in her *Holmes* concurrence that analysis of § 1961 suggests that all predicate acts are not equal. *Id.* at 282. She concluded that the language of § 1961 relating to securities fraud reflected an intention that predicate act standing not bar a RICO plaintiff bringing claims based on securities fraud. *Id.* at 282-284. The language of § 1961 relating to mail fraud is different, suggesting that Justice O'Connor's analysis would yield a different result. Thus, the mail fraud standing issue raised here does not necessarily parallel the securities fraud standing issue for which certiorari was granted in *Holmes*.

Third, ITAS' Complaint that it is being unfairly subjected to an unprecedented standing requirement must be taken with a grain of salt. This Court has repeatedly held that federal litigants are always subject to several prudential standing requirements, including one based on inclusion in the "zone of interest" over which a statute imposes its protections. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-475, 102 S. Ct. 752, 759-760 (1982). Accordingly, the Seventh Circuit's decision here is consistent with this Court's prior decisions.

Fourth, because the jury below rejected ITAS' Lanham Act claim, ITAS' RICO claim (based on the same conduct) is

essentially mooted. There was no fraud here, and no customers were misled by the respondents.

Finally, the majority of Justices on this Court previously passed over the securities fraud standing issue in *Holmes*, electing to decide on the grounds of lack of proximate cause. *Holmes*, 503 U.S. at 275-276. Respondents submit that the Seventh Circuit misapplied the proximate cause standard enunciated by this Court in *Holmes*. As in *Holmes*, ITAS is a plaintiff which could not have been directly injured by the conduct of respondents. Lacking direct injury, the *Holmes* decision requires a finding that ITAS cannot establish proximate cause. Consequently, the standing issue need not be addressed by this Court.

REASONS FOR DENYING THE WRIT

Standard for the Granting of a Writ of Certiorari

"A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. Where a conflict in the courts of appeals is raised, this Court may exercise its discretion if the subject of the conflict is on the "same important matter." Supreme Court Rule 10(a). "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 71 S. Ct. 453, 456 (1951).

I.

THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS WITH RESPECT TO THE STANDING ISSUE.

ITAS argues that the Seventh Circuit's decision in this case results in a split in the federal circuits. ITAS points to *Mid Atlantic Telecom v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994). The ruling in *Mid Atlantic* does not conflict with the Seventh Circuit's decision in this case. The Fourth Circuit in *Mid Atlantic* did not address any sort of RICO predicate act standing issue. Rather, it concluded that this Court's decision in *Holmes* was no bar to recovery by a plaintiff against a competitor for misleading statements made to mutual customers. The Fourth Circuit reasoned that the complaint in *Mid-Atlantic* should not have been dismissed because proximate cause might have been demonstrated (i) by the distinct injuries claimed by plaintiff as compared to the customers, and (2) by plaintiff's vindication of its own rights, not the customers'. *Id.* at 264. The Fourth Circuit never addressed the issue of whether the plaintiff had standing to proceed in the *Mid-Atlantic* case because that issue was never raised.

It remains an open question whether the Fourth Circuit will adopt a predicate act standing requirement under RICO for mail fraud, as the Seventh Circuit did in this case, and as the Ninth Circuit did in *Lancaster*. The question is open simply because the Fourth Circuit has not considered the issue. Consequently, the granting of certiorari in this case is unnecessary.[3]

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3. The lack of conflict here stands in sharp contrast with the conflict among the courts of appeals on the securities fraud standing issue, for which certiorari was granted in *Holmes*. 503 U.S. at 275-276 n.23 (listing cases).

Nor does the Seventh Circuit's decision here conflict with *Environmental Tectonics v. W.S. Kirpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1987). In that case, plaintiffs claimed to have been injured "by an apparently successful scheme . . . to influence the award of a Nigerian defense contract through the bribery of Nigerian government officials." 847 F.2d at 1054. The predicate acts alleged in support of their RICO claims included bribery and violations of the Foreign Corrupt Practices Act. *Id.* at 1063. The court concluded that plaintiffs had standing under RICO because they alleged injury to business or property "resulting from some or all of the predicate acts . . ." by their factually sufficient allegations of the bribery scheme. *Id.* at 1067. Neither the parties nor the court raised or addressed the issue of predicate act standing, and the Third Circuit's holding was based on the predicate act of bribery, which by its nature will damage third parties, unlike mail fraud.

In sum, the only cases in which courts of appeals have addressed the mail fraud standing issue are the Seventh Circuit in this case and the Ninth Circuit in *Lancaster*. Both the Seventh and Ninth Circuits concluded that a competitor does not have standing under RICO to sue another competitor for mail fraud directed at potential customers. Consequently, contrary to the argument asserted by ITAS, a conflict does not exist between the courts of appeals with respect to the mail fraud standing issue.

II.

THE QUESTION ACTUALLY RAISED BY ITAS' PETITION DOES NOT JUSTIFY THE GRANT OF CERTIORARI.

A. The Practical Effect of this Court Deciding the Standing Issue Raised by ITAS is Minimal.

According to ITAS, under the Seventh Circuit's analysis in this case, "a business competitor would never be able to obtain standing" bringing a RICO claim premised on mail fraud. This is true only in the narrow class of cases where a plaintiff's competitor commits mail fraud against mutual potential customers and plaintiff is damaged thereby. Left intact would be RICO cases in which the competitors defraud each other. Consequently, the practical effect of a ruling by this Court on the standing issue raised by the Seventh Circuit's decision would be slight.

In any event, a competitor in ITAS' shoes would not lose any appreciable opportunity for redress should the Seventh Circuit's ruling stand. Satisfactory remedies are available under federal and state law. Here, ITAS brought claims under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, and the Illinois and New Jersey consumer fraud statutes. Illinois Consumer Fraud Act, 815 ILCS 505; Illinois Deceptive Trade Practices Act, 815 ILCS 510; and New Jersey Consumer Fraud Act, N.J. Rev. Stat. § 56:8-12. Each of these statutes provides relief for the type of conduct ITAS claims damaged it in this case, namely, misleading statements by a competitor to mutual potential customers.

In this case, ITAS' claims under these statutes were submitted to the jury, which rejected them. All of these statutes make provision for exemplary damages and attorneys fees to the successful plaintiff. 15 U.S.C. § 1117 (treble damages and

attorneys fees); 815 ILCS 505 (double damages and attorneys' fees); N.J. Rev. Stat. § 56:8-12. Consequently, the effect of a ruling of this Court in ITAS' favor would be an additional, duplicative remedy for competitors in ITAS' shoes.

B. The Issue Raised in this Case is Much Narrower than Presented by ITAS.

In its petition, ITAS presents the following "Question Presented" for review:

> Whether a person who is injured in their business or property through a pattern of racketeering acts, must also be within the class of persons that the alleged predicate acts were designed to protect in order to have standing to pursue a claim under the Racketeer Influenced And Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*; *i.e.*, must a civil RICO plaintiff have standing to pursue the underlying predicate acts in addition to having standing under the RICO statute itself.

ITAS incorrectly states the issue. ITAS would have this Court rule that all predicate acts are the same and should be addressed as such. However, in the *Holmes* concurrences, Justice O'Connor and Justice Scalia addressed only the issue of whether standing exists when the predicate act is the offense of securities fraud. In this case, the predicate act at issue is mail fraud. Consequently, the issue before this Court is not as presented by ITAS. Rather, the issue is whether, when a competitor allegedly engages in false advertising, the allegedly harmed competitor has standing to bring a RICO claim based on the predicate act of mail fraud.

ITAS asserts that this Question Presented is "essentially the same" as the question presented but, over the objection of four concurring justices, not reached in *Holmes*. However, the issue upon which certiorari was granted in *Holmes* addressed the specific predicate act of securities fraud. *Holmes*, 503 U.S. at 264-265. As noted above, a genuine conflict in the courts of appeals existed on this issue (*infra*, fn.3). For purposes of analysis, all predicate acts are not necessarily equal for the concurring Justices in *Holmes*. And, unlike *Holmes*, there is no dispute among the courts of appeals with respect to the question actually presented by the Seventh Circuit decision in this case.

The petition for certiorari in *Holmes* addressed a narrow standing issue: if a plaintiff could not bring a civil securities fraud claim under Rule 10b5 by virtue of not being a purchaser or seller of securities, could that same plaintiff maintain a RICO claim where the predicate act is securities fraud? *Id.*

The *Holmes* majority identified this as a Rule 10b5 "standing issue," which it did not reach, instead concluding that § 1964(c)'s "by reason of" language imposed a proximate cause limitation which plaintiff in that case did not meet. *Id.* at 265-266, 275-276. The majority concluded that the proximate cause issue was "fairly included" in the Rule 10b5 standing issue, and stated that the split in the circuits on the securities fraud "standing question" under RICO could have been resolved, in each case identified, on proximate causation grounds. *Id.* at 266, n. 12. ITAS points to the concurrences in *Holmes* as justifying a grant of certiorari in this case. However, the reasoning of Justice O'Connor's concurrence (joined by Justices White and Stevens), and Justice Scalia's separate concurrence, suggest that the standing issue asserted here by ITAS is in fact much narrower than ITAS claims and significantly different from the standing issue in *Holmes*.

Justice O'Connor's concurrence examined the RICO statute to determine the scope of its standing requirements. She began with §1964(c), noting that it contained no purchaser/seller limitation. However, Justice O'Connor then conceded that it may be necessary to review §1961(1) to determine whether a party has standing to proceed under the specific predicate act:

> Although the civil suit provisions of § 1964(c) lack a purchaser/seller requirement, it is still possible that one lurks in § 1961(1)'s catalog of predicate acts; i.e., it is possible that § 1961(1) of its own force limits RICO standing to the actual parties to a sale.

Id. at 281.

By Justice O'Connor's reasoning, the text of § 1961(1) must be consulted in determining whether predicate act standing was intended under RICO. Justice O'Connor further noted that the language of § 1961 which addresses securities fraud (§ 1961(1)(D)) is significantly different than the language addressing mail fraud (§ 1961(1)(B)). In § 1961(1), the term "fraud in the sale of securities" is not defined. In contrast, the predicate act of mail fraud contained in § 1961(1) specifically references the mail fraud statute. *Id.* at 281-283. As a result, Justice O'Connor's concurrence suggests that a standing requirement may exist with respect to RICO claims based upon the predicate act of mail fraud.

In his concurring *Holmes* opinion, Justice Scalia agreed that the purchaser/seller standing issue should have been addressed by the Court, and that a standing limitation did not apply in civil RICO cases alleging a violation of Rule 10b5 as the predicate act. Justice Scalia, however, began by distinguishing the two types of standing requirements: "statutory standing" and "zone of

interest standing." According to Justice Scalia, persons other than purchasers or sellers of securities were beyond the zone of interest of Rule 10b5 for civil cases brought under that Rule. Justice Scalia further pointed out that "zone of interest" analysis was appropriate in connection with legislation, *i.e.*, was plaintiff within the class of people intended to be protected by the statute in question? *Id.* at 286-287. Justice Scalia concluded that this type of analysis was not appropriate for civil causes of action under Rule 10b5, because these claims are judicially created. *Id.*, *cf. Blue Chip Stampsv. Manor Drug Stores*, 421 U.S. 723 (1975).

Justice Scalia stated that a separate "zone of interest" analysis would be necessary for each of the predicate acts listed in §1961(1). According to Justice Scalia, that test would "vary according to the nature of the criminal offenses upon which those causes of action are based." *Id.* at 288. Justice Scalia concluded that a RICO plaintiff must be within the "zone of interest" of the statute upon which the predicate act is based. *Id.* For the Seventh Circuit Court of Appeals in this case, Judge Easterbrook cited Justice Scalia's *Holmes* concurrence as authority for the proposition that ITAS was not within the zone of interest for the mail fraud statute, therefore failing to satisfy the standing requirements of RICO. *Israel Travel*, 61 F.3d at 258 (ITAS App.13).

For these reasons, under Justice O'Connor's concurrence and Justice Scalia's concurrence in *Holmes*, analysis of whether a RICO plaintiff bringing a claim based on predicate acts of mail fraud must meet standing requirements under the mail fraud statute is a different question than was addressed by the concurring justices. The Question Presented by ITAS simplistically (and inaccurately) treats as one all RICO claims regardless of the predicate act upon which they are based. Accordingly, ITAS has overstated its case. The issue raised by the Seventh Circuit's decision here is narrower, and

consequently of less importance, than ITAS asserts in its Petition. Furthermore, the Seventh Circuit ruling that ITAS did not have standing under the predicate act of mail fraud is supported by the concurrence of Justice Scalia and is not inconsistent with the concurrence of Justice O'Connor.

III.

WHAT ITAS IDENTIFIES AS A "DOUBLE STANDING" REQUIREMENT IS SUPPORTED BY THIS COURT'S PRIOR DECISIONS.

ITAS argues repeatedly in its Petition that the Seventh Circuit's ruling creates an unprecedented "double standing" requirement for RICO litigants. ITAS refers, first, to § 1964(c) of RICO ("Any person injured in his business or property by reason of a violation of § 1962 of this chapter . . ."), and second, to the "zone of interest" standing requirement under the mail fraud statute, which the Seventh Circuit found dispositive in this case. ITAS contends that this purported double standing requirement is novel and unprecedented. ITAS is incorrect.

Any federal litigant has always been subject to, not only the cases and controversies standing requirement of Article III of the Constitution, but also a set of prudential standing principles. These include: (1) that a plaintiff must assert its own legal rights and not those of third parties; (2) that a plaintiff cannot bring "generalized grievances" appropriately addressed in the representative branches; and (3) that plaintiff's complaint must "fall within 'the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-475, 102 S. Ct. 752, 759-760 (1982), *quoting*, *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970); *Gladstone,*

Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1978). Consequently, multiple standing limitations, including a "zone of interest" standing requirement, are well grounded in this Court's prior decisions.

In addition, a mail fraud standing requirement here is not an unfair burden on the RICO plaintiff. What may seem an unusual result of requiring a RICO plaintiff to meet standing requirements for two separate causes of action (*i.e.*, RICO and mail fraud, in this case) is in large part a reflection of the peculiar device of the RICO statute to premise RICO liability upon predicate acts which are each themselves separate and independent causes of action. Whether mail fraud standing is required for ITAS may depend at least in part upon whether § 1961, the catalog of predicate acts, expands the explicit statutory standing requirement of § 1964(c), a possibility admitted by Justice O'Connor in her concurrence in *Holmes*. In light of the statutory scheme of RICO itself, the predicate act standing requirement is not onerous or unfair.

IV.

THE JURY'S VERDICT IN THIS CASE THAT RESPONDENTS DID NOT VIOLATE THE LANHAM ACT RENDERS ITAS' RICO CLAIMS MOOT.

Even if this Court were to consider the mail fraud predicate standing question under RICO as a significant and important issue, respondents respectfully submit that this is the wrong case to decide the question. In the trial court in this case, ITAS brought Lanham Act claims and state Consumer Fraud and Deceptive Business Practice claims against the respondents. The Lanham Act claim, which was premised upon the same acts as the RICO claims, was submitted to the jury. The jury found against ITAS, and in favor of respondents on these claims. As a result, ITAS no

longer has a basis for a RICO claim against the respondents in this case. Accordingly, with respect to petitioner and respondents here, any disposition of the RICO issue raised would not ultimately change the Seventh Circuit's conclusion that ITAS does not have a RICO claim.

V.

PROPER APPLICATION OF HOLMES WOULD DISPOSE OF THIS CASE ON PROXIMATE CAUSATION GROUNDS.

The majority in *Holmes* stated that proximate causation analysis would have resolved what was asserted to be a conflict in the Circuits with respect to the purchaser/seller standing issue under RICO. Both the Seventh Circuit in this case and the Fourth Circuit in *Mid Atlantic Telecom* applied the proximate cause rule described in *Holmes*. Respondents respectfully submit that the Seventh Circuit misapplied the *Holmes* standard in this case in concluding that ITAS met the proximate cause standard under *Holmes*. The district court entered summary judgment on the RICO claims because ITAS failed to demonstrate proximate cause between its injuries and the conduct of IIT-NJ and Larry Ritter. The trial court correctly relied upon *Holmes* when it concluded that ITAS could not establish proximate cause in this case.

In *Holmes*, this Court ruled that a party whose injury is indirect, as in this case, cannot establish that its injuries were proximately caused by the defendants' predicate acts.

> We hold not that RICO cannot serve to right the conspirators' wrongs, but merely that the nonpurchasing customers . . . are not proper plaintiffs . . . Allowing suits by those injured

> only indirectly would open the door to 'massive and complex damages litigation.' *Associated General Contractors*, 459 U.S. at 545, 103 S. Ct. at 912.

Holmes, 503 U.S. at 274. In this case, ITAS was neither a purchasing or a non-purchasing customer of IIT-NJ so any claimed injury was clearly indirect.[4]

This Court concluded that, for proximate cause to exist in RICO cases, there must be proof of "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 273. Thus, a plaintiff who complains of harm merely flowing from the misfortunes visited upon a third person by the defendants' acts stands at too remote a distance to recover. *Id.*

ITAS cannot overcome the requirement of direct injury to prove proximate cause. ITAS failed to show that customers were deceived by the alleged predicate acts of IIT-NJ who consequentially travelled with IIT-NJ instead of ITAS. But, even if ITAS had made such a showing, that would have been insufficient to establish proximate cause pursuant to *Holmes*.

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4. In *Holmes*, the plaintiff was a broker-dealer who represented customers who had allegedly been defrauded by the defendant. The Supreme Court ruled that only the injuries of the customers, not the broker-dealer, were proximately caused by the defendant's predicate acts. *Holmes*, at 272-274.

CONCLUSION

There is no conflict in the federal circuits on the issue presented by ITAS' petition. The issue presented is a narrow one, which would affect only a small subset of RICO claimants: plaintiffs suing a competitor under RICO based on mail fraud, where misleading information has allegedly been disseminated to customers. Finally, what ITAS decries as a "double standing" requirement is well supported in this Court's previous cases including the concurrences in *Holmes*. For the foregoing reasons, as well as the fact that the jury decision has rendered the respondents' liability in this case moot, respondents respectfully request that the Petition for Certiorari filed by ITAS be denied.

Respectfully submitted,

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